UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

JOHN H. WALTON,

Plaintiff,

v.

Case No. 2:02-cv-117
HON. GORDON J. QUIST

BARBARA BOUCHARD, et al.,

Defendants.
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REPORT AND RECOMMENDATION

Plaintiff John H. Walton, an inmate at the Alger Maximum Correctional Facility (LMF), filed this pro se civil rights action pursuant to 42 U.S.C. § 1983 against defendants Warden Barbra Bouchard, Deputy Warden Ken Gearin, ADW D. Bergh, ADW Ron Bobo, ROM Cathy Bauman, and Case Manager Denise Gerth.

Plaintiff alleges that he was discriminated against based upon his race when he was given an indefinite upper slot restriction after assaulting an officer. Plaintiff, who is black, has asserted that white prisoners who assaulted officers received an upper slot restriction for only a limited time period. Plaintiff names two white prisoners who assaulted officers and were given upper slot restrictions that have now been lifted.

Defendants move to dismiss the complaint for failure to exhaust grievance remedies. Pursuant to 42 U.S.C. § 1997e(a), a prisoner bringing an action with respect to prison conditions under 42 U.S.C. § 1983 must exhaust available administrative remedies. See Porter v. Nussle, 534 U.S. 516, 122 S. Ct. 983 (2002); Booth v. Churner, 532 U.S. 731 (2001). A prisoner must exhaust available administrative remedies, even if the prisoner may not be able to obtain the specific type

of relief he seeks in the state administrative process. See Porter, 122 S. Ct. at 988; Booth, 532 U.S. at 741; Knuckles El v. Toombs, 215 F.3d 640, 642 (6th Cir.), cert. denied, 531 U.S. 1040 (2000); Freeman v. Francis, 196 F.3d 641, 643 (6th Cir. 1999). A district court must enforce the exhaustion requirement sua sponte. Brown v. Toombs, 139 F.3d 1102, 1104 (6th Cir.), cert. denied, 525 U.S. 833 (1998); accord Wyatt v. Leonard, 193 F.3d 876, 879 (6th Cir. 1999).

After defendants filed their motion to dismiss, plaintiff for the first time submitted copies of the grievances that he filed on this issue. Plaintiff did file a grievance through Step III of the grievance process asserting that he was discriminated against due to his race when he received an indefinite upper slot restriction. Plaintiff, however, only filed his grievance against defendant Bobo. Plaintiff failed to mention the other named defendants in his grievances, even after the Step I response informed plaintiff that defendant Gearin was responsible for giving him the restriction.

Because Plaintiff exhausted his claim against only one of the named Defendants, the court can dismiss this action pursuant to the "total exhaustion" rule. Under the total exhaustion rule, the presence of an unexhausted claim results in the dismissal of the entire action. Currently, a split exists in this District concerning the validity of the "total exhaustion" interpretation of 42 U.S.C. § 1997e(a). Smeltzer v. Hook, 235 F. Supp. 2d 736 (W.D. Mich. 2002) (applying total exhaustion rule) (comparing Keenan v. Twommy, No. 1:97-cv-549 (W.D. Mich. July 29, 1999) (applying total exhaustion rule) with Jenkins v. Toombs, 32 F. Supp. 2d 955 (W.D. Mich. 1999) (rejecting total exhaustion rule). In Knuckles El v. Toombs, 215 F.3d 640, 642 (6th Cir. 2000), cert. denied 531 U.S. 1040, 121 S. Ct. 634 (2000), the Sixth Circuit "reserve[d] to another day the question of whether 'exhausted claims' in a 'mixed complaint' should be addressed when such claims would otherwise meet the pleading requirement or whether such claims should be dismissed in their entirety."

In Smeltzer, the court noted that the majority of courts that have addressed the issue have applied the total exhaustion rule. 235 F. Supp. 2d at 743. In addition, the court noted that the total exhaustion rule is supported both by the plain meaning of 42 U.S.C. § 1997e(a) and strong policy interests. Smeltzer, 235 F. Supp. 2d at 743. Section 1997e(a) provides, "No *action* shall be brought with respect to prison conditions under section 1983 of this title . . . until such administrative remedies as are available are exhausted." 28 U.S.C. § 1997e(a). As noted in Smeltzer, Congress indicated that a prisoner is required to exhaust all claims before his action may proceed by using the word "action" instead of "claim." Smeltzer, 235 F. Supp. 2d at 744.

As noted by the court in Smeltzer, if Congress had intended to permit the piecemeal adjudication of claims relating to prison conditions, the statute would have precluded the bringing of unexhausted *claims* rather than *actions*. 235 F. Supp. 2d at 744 (emphasis in original). Section 1997e(c)(1) provides that the district court shall dismiss any "action" which is frivolous, malicious, or fails to state a claim. In contrast, § 1997e(c)(2) provides that the district court may dismiss a "claim" which is frivolous, malicious or fails to state a claim without first requiring exhaustion of administrative remedies. It is apparent that Congress realized that requiring dismissal without prejudice under § 1997(a) might prevent a court from dismissing with prejudice for frivolousness or failure to state a claim. Therefore, Section 1997e(c)(2) serves to reconcile § 1997(a) and § 1997(e)(1) by permitting a court to dismiss an unexhausted claim as frivolous, thus preventing an unexhausted claim from 'holding up' the dismissal of a frivolous action comprising otherwise exhausted claims." Smeltzer, 235 F. Supp. 2d at 744.

In Smeltzer, the court noted that the general intent of the PLRA and other strong policy arguments offer additional support for a total exhaustion rule. As noted by the Eleventh Circuit, Congress amended § 1997e(a) largely in response to concerns about the heavy volume of

frivolous prison litigation in the federal courts. Smeltzer, 235 F. Supp. 2d at 744 (citing Alexander v. Hawk, 159 F.3d 1321, 1326 n.11 (11th Cir. 1998) (citing 141 Cong. Rec. H14078-02, *H14105 (daily ed. Dec. 6, 1995)). "Congress desired 'to wrest control of our prisons from the lawyers and the inmates and return that control to competent administrators appointed to look out for society's interests as well as the legitimate needs of prisoners.'" Id. (quoting 141 Cong. Rec. S14408-01, *S14418 (daily ed. Sept. 27, 1995)).

The total exhaustion rule advances the goals of the PLRA by discouraging frivolous prisoner litigation and conserving judicial resources. Smeltzer, 235 F. Supp. 2d at 744-45. The total exhaustion rule also discourages prisoners from bringing unexhausted or frivolous claims. If only the unexhausted claims were dismissed from a mixed complaint, there is nothing to deter prisoners from raising unexhausted claims indiscriminately. Moreover, the assessment of a second filing fee after the prisoner has properly exhausted all of his claims also serves as a deterrent against filing unexhausted or frivolous claims. Smeltzer, 235 F. Supp. 2d at 745.

In addition, the court in Smeltzer held that application of a total exhaustion rule in the civil rights context promotes comity in much the same way as in the habeas corpus context, where the total exhaustion rule is clearly established. 235 F. Supp. 2d at 745. Regarding the amendments by the PLRA to § 1997e(a), the Smeltzer court quoted Brown v. Toombs, 139 F.3d at 1103, as follows:

> The new statute has extensive benefits. It recognizes that it is difficult to explain why we require full exhaustion in habeas corpus cases involving life and liberty, but allow direct access in prison cases under § 1983. As Justice Stewart stated in Preiser v. Rodriguez, 411 U.S. 475, 491-92, 36 L. Ed. 2d 439, 93 S. Ct. 1827 (1973):
>
> > Since these internal problems of state prisons involve issues so peculiarly within state authority and expertise, the states have an important interest in not

> being bypassed in the correction of these problems. Moreover, because most potential litigation involving state prisoners arises on a day to day basis, it is most efficient and properly handled by the state administrative bodies and the state courts, which are for the most part, familiar with the grievances of state prisoners and in a better physical and practical position to deal with these grievances.

Smeltzer, 235 F. Supp. 2d at 745.

As concluded by the court in Smeltzer, the principles of comity require that prison officials have a full opportunity to address claims raised by prisoners before they are brought to federal court. "By requiring total exhaustion, the federal courts not only will promote comity, but also will reap the benefits of 'more focused complaints and more developed evidentiary records.'" Smeltzer, 235 F. Supp. 2d at 745 (citing Rivera v. Whitman, 161 F. Supp. 2d 337, 343 (D.N.J. 2001).

Moreover, in Storey v. Hutchinson, 56 Fed. Appx. 228 (6th Cir. 2003), the Sixth Circuit recently affirmed the dismissal of a prisoner civil rights complaint for lack of complete exhaustion of remedies. 56 Fed. Appx. at 229. In Storey, the Plaintiff had submitted affidavits that no grievance procedure was available to him, but later recanted and filed documents showing that he had exhausted his available remedies as to some of the many claims he raised. The district court dismissed the suit pursuant to 42 U.S.C. § 1997e because of Plaintiff's failure to show that he had exhausted all available administrative remedies. Id. In affirming the dismissal, the court stated that the PLRA requires a prisoner to exhaust all available administrative remedies before filing a civil rights action in federal court, and that when a prisoner fails to exhaust his administrative remedies before filing his complaint, or only partially exhausts his remedies, dismissal of the complaint is appropriate. Id.

Plaintiff has filed separate requests for summary judgment in his favor because he asserts that he exhausted his grievance remedies. Plaintiff adopts defendants' motion to dismiss as support for his claim of entitlement to summary judgment. First, plaintiff has not completely exhausted his grievance remedies against each of the named parties. Second, even if he did exhaust grievance remedies, exhausting grievance remedies does not provide a necessary factual basis to prevail on the merits of the claim. Plaintiff has failed to show that no genuine issue of material fact exists for trial and that he is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-323 (1986).

Accordingly, it is recommended that defendants' motion to dismiss (Docket #32) be granted, dismissing plaintiff's complaint without prejudice for failure to exhaust grievance remedies. It is further recommended that plaintiff's motions for summary judgment (Docket ## 36, 45 and 56) be denied.

NOTICE TO PARTIES: Objections to this Report and Recommendation must be served on opposing parties and filed with the Clerk of the Court within ten days of your receipt of this Report and Recommendation. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b); W.D. Mich. LCivR. 72.3(b). Failure to file timely objections constitutes a waiver of any further right to appeal of those issues or claims addressed or resolved as a result of the Report and Recommendation. United States v. Walters, 638 F.2d 947 (6th Cir. 1981). See also Thomas v. Arn, 474 U.S. 140 (1985).

/s/ Timothy P. Greeley
TIMOTHY P. GREELEY
UNITED STATES MAGISTRATE JUDGE

Dated: July 28, 2003